June 6, 2022

The Honorable Patrick Toomey
Ranking Member
Senate Committee on Banking, Housing, and
Urban Affairs
U.S. Senate
Washington, D.C. 20515

Re: Request for Feedback re The JOBS Act 4.0

Dear Senator Toomey:

Cboe Global Markets, Inc. ("Cboe") is a leading market operator, an advocate for capital markets, and a strong supporter of efforts to promote capital formation.[1] We appreciate your request for feedback in connection with the JOBS Act 4.0 discussion draft, which seeks to facilitate capital formation and help economic growth.

Innovation and competition are the backbone of our capital markets and are a large reason why the U.S. capital markets are the envy of the world. Registered national securities exchanges not only play a critical role when it comes to price discovery, they also innovate and compete vigorously – to the benefit of investors.

Cboe has long supported thoughtful innovation[2] as we continue to deliver cutting-edge trading, clearing, and investment solutions to investors globally. Cboe is a supporter of targeted market structure reforms that improve markets and the overall investor experience. Additionally, Cboe believes that investors benefit from having more public companies in (and staying in) the ecosystem.

Cboe truly supports efforts to continuously enhance capital formation and increase access to capital. The JOBS Act 4.0 package keeps attention squarely on these important topics. Cboe's comments in connection with the discussion draft are focused on a specific bill that impacts our markets. Specifically, Cboe would like to share our thoughts around Sec. 107 (S. 3097) of the discussion draft, The Main Street Growth Act, and how it could be improved to further its stated goals in support of small issuers.

[1] In the U.S., Cboe operates four stock exchanges (BYX Equities, BZX Equities, EDGA Equities, and EDGX Equities), four U.S. options exchanges (Cboe Options, C2 Options, BZX Options, and EDGX Options), a futures exchange (CFE), a swap execution facility (Cboe SEF), and a foreign exchange trading platform (Cboe FX).

[2] Cboe is the creator of exchange-listed options and continues to bring novel products and offerings, including the recently introduced Periodic Auctions on our BZX Equities exchange, to market.

Cboe endorses the exploration of tailored platforms for new smaller entrants to our capital markets. However, Cboe is concerned that eliminating venue competition for securities that are already listed and trading in the NMS system, would damage market quality and harm investors.

Cboe's main concern with S. 3097 is that, as drafted, it seeks to eliminate unlisted trading privileges ("UTP") for any and all companies that qualify as a "venture security" either currently or at any point in the future. Specifically, the bill would eliminate UTP for thousands of currently listed stocks and remove them from the NMS system.

In 2000, the Securities and Exchange Commission ("SEC") amended Rule 12f-2 under the Securities Exchange Act of 1934 ("Exchange Act"), which governs UTP in listed initial public offerings. Under the amendment, a national securities exchange extending UTP to an IPO security listed on another exchange no longer is required to wait until the day after trading has commenced on the listing exchange to allow trading in that security.[3] The SEC's justification for the amendment was that it would "benefit market participants by allowing UTP exchanges to compete with the listing exchange" and that "issuers could benefit from wider distribution of IPO securities and greater opportunities for price discovery."[4] This justification holds true today. Cboe believes that competition between national stock exchanges is no less important and no less beneficial to market participants, including issuers, than it was over two decades ago.

Over the years, exchange competition has facilitated continued innovation.[5] In the same vein, Cboe has previously introduced targeted solutions in an effort to provide increased liquidity for so-called thinly traded securities (many of which would qualify as "venture securities" under proposed S. 3097) without eliminating competition. For example, we have recently implemented Periodic Auctions in the U.S. as a way to cultivate and centralize liquidity and improve overall market quality for investors – including in thinly traded securities, which by their nature tend to have less liquidity available and trade in lower volumes. Currently, Cboe has a small number of clients that are sending in Periodic Auction orders daily in the U.S. and other customers that are in testing mode as well as another group that is planning to begin utilizing this new order type in the coming months. It is important to allow ample time for Periodic Auctions to gain momentum in the U.S., but Cboe would be happy to share market quality statistics with regard to Periodic Auction orders in the U.S. in the near future.

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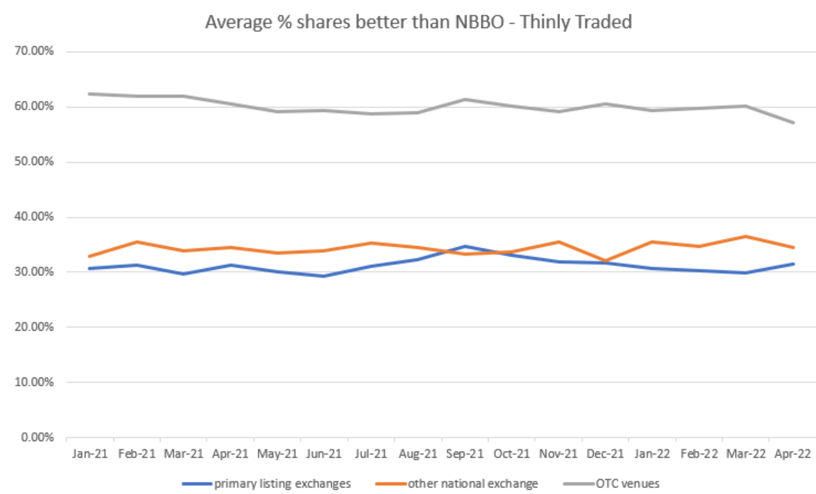
[3] "Unlisted Trading Privileges," Securities Exchange Act Release No. 34-43217 (September 5, 2000), 65 FR 53560.

[4] *Id.* at 53563.

[5] Cboe's innovations include, among others, Cboe Market Close (CMC). CMC was approved by the SEC and launched in March 2020 as a way to reduce closing auction costs and provide an alternative source of on-close liquidity for market participants by creating competition around Market-On-Close (MOC) orders.

The value brought to investors from Periodic Auctions and other innovations aside, current data simply does not support that eliminating UTP for thinly traded securities[6] will improve market quality. For example, the data represented in the chart below demonstrates that while price improvement[7] offered by the primary listing exchange compared to the other national securities exchanges has been quite comparable during the past year or so, when it comes to thinly traded securities, the other national securities exchanges as well as off-exchange venues are often providing better price improvement for investors. This further demonstrates the value that competition and innovation provide to investors and the capital formation process for smaller issuers.



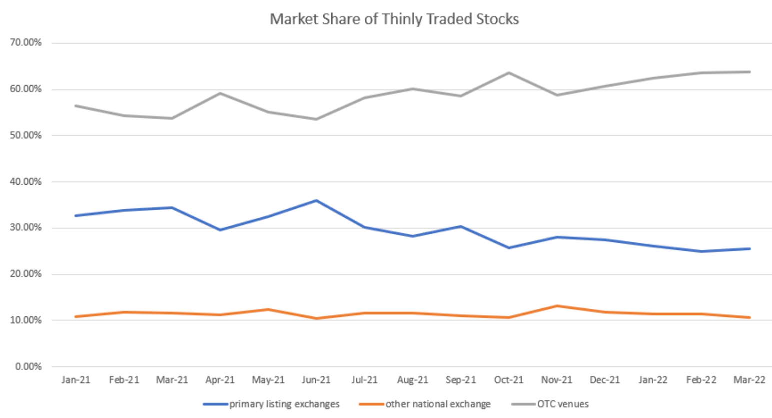
Further, the chart below shows that the primary listing exchange already accounts for approximately 25% of trading volume in thinly traded stocks with other national securities exchanges accounting for approximately 10% (there is significantly more off-exchange trading occurring in thinly traded stocks than actively traded stocks - approximately 63% compared to approximately 40% during the same period).[8] The UTP elimination feature of the Main Street Growth Act would cut out important competition and innovation in order to confer 10% or so additional market share onto the primary listing exchange. We are skeptical that market quality would improve from that relatively minor shift – it certainly isn't supported by any data.

[6] Although there is no generally accepted definition of "thinly traded securities," corporate equity securities that have a market capitalization of $2 billion or less, and trade an average daily volume ("ADV") of 50,000 shares or less, may be considered thinly traded.

[7] All of the data is as of April 2022. In this instance, price improvement means the percentage of average daily volume in a particular stock that is executed at a price that is better than the National Best Bid and Offer ("NBBO") during the regular trading session. The data shows the median percentage of shares that are better than the NBBO.

[8] March 2022.

We also question whether concentrating trading volume in these securities is the answer. As recently as one year ago, the primary listing exchange market share in thinly traded stocks was closer to 35% and that increased market share had no impact on market quality. Cboe does not believe that doubling down on something that has not made a meaningful difference is prudent – especially when it also eviscerates competition and innovation provided by other exchanges.



There may be no silver bullet to radically improve market quality in thinly traded stocks, but Cboe has ideas for other potential improvements that could be explored to improve capital formation for small issuers and market quality for investors – none of which would eliminate competition or require major surgery to the current U.S. equities market structure (which would most certainly involve undesired and unintended consequences).

For example, Cboe introduced a Lead Market Maker ("LMM") program that provides daily incentives to LMMs that meet certain enhanced market quality standards in exchange-traded products ("ETPs") listed on Cboe's BZX Equities Exchange. This revised LMM program was designed to encourage the provision of liquidity in new and lower volume ETPs where certain transaction-based compensation, such as rebates, may not be sufficient to incentivize improvements in market quality. Market maker liquidity provision programs for thinly traded stocks are worth exploring as a way to increase market quality while continuing to encourage exchange competition. For example, language could be added to S. 3097 to explicitly permit incentive payments to market makers that meet certain quoting requirements in thinly traded stocks. These types of incentive programs have been utilized successfully by futures exchanges regulated by the Commodity Futures Trading Commission for some time, especially with respect to new or less liquid products.

Additionally, rather than eliminate important and healthy competition in these stocks between the various registered exchanges, Cboe believes that S. 3097 could instead include text to instruct the SEC to explore solutions including potentially waiving the Order Protection Rule for a subset of thinly traded securities on a pilot basis. This type of targeted enhancement would allow liquidity and order flow to more freely be directed to venues of choice, but importantly would not completely prohibit securities exchanges from competing.

Another solution the Commission could explore would involve removal of the access fee cap for these thinly traded securities that meet the definition of "venture security" under proposed S. 3097. Removing the current access fee cap constraint of 30 mil ($0.003)[9] per share would allow exchanges to have more flexibility in order to incent liquidity provision in thinly traded stocks through more robust rebates.

Cboe continues to believe that targeted solutions for thinly traded securities that improve the overall investor experience while also furthering investor choice, rather than eliminating competition are a preferred course of action.

Cboe appreciates the opportunity to share our thoughts in connection with improving the Main Street Growth Act to encourage, not prohibit innovation and competition, in order to better facilitate capital formation and improve market quality for thinly traded securities.

Sincerely,

Angelo Evangelou
Chief Policy Officer
Cboe Global Markets, Inc.

[9] *See* Reg NMS Rule 610.